

Citation: *A. S. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 26

Appeal No: GT-115010

BETWEEN:

A. S.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Jane Galbraith

TYPE OF HEARING: Questions and answers

DATE OF DECISION: September 9, 2014

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on July 23, 2010. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was by questions and answers for the reasons given in the Notice of Hearing dated July 10, 2014.

THE LAW

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) Be under 65 years of age;
- b) Not be in receipt of the CPP retirement pension;
- c) Be disabled; and
- d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[6] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[7] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

[8] The Tribunal finds that the MQP date is December 31, 2012.

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

EVIDENCE

[10] The Appellant was 35 years old on the date of her MQP.

[11] In her CPP questionnaire the Appellant indicates she was diagnosed with Tachycardia in her late teens. In 1995 she had an ablation treatment in Hamilton and in 2000 was diagnosed with atrial fibrillation. She reports this is a rare condition for someone her age and has recently become painful and debilitating. She is very lethargic, exhausted and cannot focus or concentrate fully while her heart is beating irregularly. (GT1-38)

[12] The Appellant's cardiologist understood in 2011 that the Appellant was not mentally fit to undergo another ablation therapy with the risks involved. The first ablation was in 1995. Five years later the Appellant was diagnosed with atrial fibrillation. (GT0A-3)

[13] The Appellant reports in her questionnaire that she sees a chiropractor 1-2 times a week and it has been helpful but the results only last for 12 hours. She started attending an acupuncturist January 2010.

[14] Dr. Cicoria, Family Physician indicated when he completed the CPP medical in August 2010 that the prognosis was guarded. He has been her Family Physician since 1990. He states the ablation therapy in 1995 was unsuccessful but it may possibly be repeated in the future.

[15] In October 2004 after her son was born the Appellant complained to her cardiologist, Dr. Morillo that she was having at least two episodes of atrial fibrillation a week, which made her very symptomatic. At that time, after discussion with her cardiologist, she tried a medication for a six-month trial. Depending on the outcome, the possibility of radiofrequency ablation would be considered. (GT1-64)

[16] In May 2009 Dr. Morrillo reported the Appellant was on Sotalol 40 mg and did not see the need to change her medication. She also has Propafenone 300 mg as a pill she takes when symptoms occur. She did not want to take the route of another EP study and eventual vein isolation, as she is afraid of the risks of this intervention. (GT1-67)

[17] In May 2010 the Appellant was seen in the cardiology clinic with continued episodes of atrial fibrillation. She had had 8 episodes in the last year with two of them being halted by taking the propafenone. She felt very stressed out and reported it was having a psychological effect on her life. She did not want to have ablation therapy. She was changed to another cardiac medication. (GT1-68)

[18] In June 2010 the Appellant was sent for a second opinion to Dr. Dias, a cardiologist at London Health Sciences Centre. He notes when she has episodes of atrial fibrillation she is very tired for a couple of days after the episode. The new medication prescribed for her in May caused her heart to pound all the time and she had to stop the medication. His conclusions of his assessment were that the Appellant was having ongoing episodes of paroxysmal self-terminating atrial fibrillation with significant intolerance to antiarrhythmic medication. He noted her exercise tolerance was excellent. His discussion with her resulted in her considering pulmonary vein ablation. She was concerned about why the success rate was 70% versus 100%. He was referring her back to Dr. Morillo for this procedure. (GT1-71)

[19] In January 2011 Dr. Pitblado, a chiropractor, wrote a letter in support of the Appellant's disability application. She reports the regular frequency in which the Appellant has and is receiving treatment for pain between her shoulder blades. She also notes the Appellant's adherence to regularly doing home exercises and any suggestion that would

improve her condition. She opines the Appellant continues to be disabled from work due to her symptoms. (GT1-85)

[20] In February 2011 Dr. Cicoria stated the frequent office visits with the Appellant. He reported her symptoms as being vertigo, black outs, shortness of breath and chest tightness. These symptoms have resulted in the Appellant's depression, inability to drive, fatigue and inability to perform household chores. She has had numerous visits to the Emergency Department. He stated the Appellant was at that time to be permanently and totally disabled. (GT1-74)

[21] Diana Noakes-Jarrell, a mental health nurse, wrote a letter of support in April 4, 2011. She reports having known the Appellant for 3 years and provided some observations. She indicates the Appellant had a notable deterioration in the Appellant's functioning in the last year. She describes the Appellant suffering from increased, unrelenting pain and decreased ability to manage the pain. Her attempt at alternate health options had proven largely ineffective. Her energy is focused on caring for her 6-year-old son but is limited as to the amount of physical activity she can engage in with him. She has developed an increasing dependence on her husband. Ms. Noakes-Jarrell opines that the Appellant is suffering a significant disturbance in her ability to function. She is not able to complete her ADLs. (GT1-5)

[22] In March 2012 a Review Tribunal adjourned a hearing as the Appellant was waiting for documents. She had a letter prepared to read to the Tribunal so she would not experience an anxiety attack. In that letter she explained the mounting depression and anxiety. She was referred to Dr. Sharma, a psychiatrist, in June 2011 and she prescribed an anti-depressant and trialed several different anti-anxiety medications. In February 2012 the Appellant's cardiologist was continuing to conduct tests to ensure that ablation was the right treatment for her. Her family and especially her son are experiencing negative effects from her condition and her significant limitations. (GT1-104)

[23] Dr. Sharma, a psychiatrist has been treating the Appellant since June 2011. His diagnosis of the Appellant is major depressive disorder with panic disorder and agoraphobia. He indicates her GAF score is 40-45 when he sent a letter to the Review Tribunal in April

2012. His opinion is that the Appellant has limited coping and functioning abilities and tends to decompensate under stressful situations. He does not feel she is capable of engaging in any kind of employment and her prognosis is poor. (GT1-126)

[24] The Appellant notes in her letter sent to the SST on August 7, 2014 that she continues to see Dr. Sharma every two to three months concerning her anxiety. The Appellant has had negative effects from medications in the past and is not able to tolerate conventional pharmaceutical treatments. She reports Dr. Sharma has been supportive of her application for disability benefits. (GT0A-2)

[25] The Appellant indicated in her answers to the questions from the Tribunal Member that she had attempted short periods of working with clients within the restrictions placed by her physician. When she had a client to provide care to she proved to be a very unreliable worker frequently having bouts of atrial fibrillation and only able to work a few times a month. (GT0A-2)

[26] At the end of May 2010 the Appellant's Family Physician advised her to take time off work due to her chronic irregular heartbeats, anxiety and muscle tension throughout her body with no underlying cause. (GT0A-3)

[27] The Appellant states that she is not able to predict with any regularity how she will feel from day to day. What does occur every morning is a racing heart that does not subside for a few hours. Due to those symptoms she does not leave the house until the afternoon.

[28] The Appellant's previous employer, Lansdowne Children's Centre was very understanding of her restrictions but even with this benevolent employer the Appellant could not work more than a few days per month. (GT0A-4)

SUBMISSIONS

[29] The Appellant submitted that she qualifies for a disability pension because:

- a) When she tried to work she was only able to manage about 12 hours a month and she was very unreliable in meeting the needs of her employer.

- b) Despite being young and not having aggressive psychiatric treatment does not mean my condition is not severe and prolonged. I do qualify for this benefit.
- c) The amount of work that I might be able to do, at the detriment of my health would not be substantially gainful.

[30] The Respondent submitted that the Appellant does not qualify for a disability pension because:

- a) There was no medical documentation or evidence of investigation concerning the Appellant's vertigo.
- b) The report from Dr. Sharma does not indicate which if any antidepressant medication has been used. It also does not indicate findings of her mental status. There was no evidence of cognitive dysfunction reported.
- c) The report of the nurse who indicated some of the Appellant's functional limitations seem to be inconsistent with the cardiologist who reported the Appellant had an excellent exercise tolerance.
- d) The additional information provided by the Appellant did not show that she had tried any alternate type of work and she is not precluded from all work. She is also being treated conventionally and is monitored fairly infrequently by her psychiatrist (every 2-3 months) and cardiologist.

ANALYSIS

[31] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2012.

Severe

[32] The Tribunal found the evidence provided by the Appellant in written form to be clear and concise in describing her condition and its effect on her life and ability to work. Her answers are consistent with the other evidence from numerous health care professionals provided throughout the hearing file.

[33] The Tribunal accepts the evidence provided by the Appellant as fact. There is little evidence provided about vertigo as noted by the Respondent. However it is clear to the Tribunal from the evidence on file that this is not the primary reason for the Appellant not being able to work.

[34] Each case must be considered on its own particular facts, and the test in each case is whether the Appellant has acted reasonably having regard to her own particular circumstances and capabilities: *Bulger v MHRD*, (May 18, 2000), CP 9164(PAB).

[35] In the case of *Petrozza v. MSD* (October 27, 2004), CP 12106 (PAB), the Review Board pointed out that it is not the diagnosis of a condition of a disease that automatically precludes one from working. It is the effect of the disease or condition on the person that must be considered.

[36] The Tribunal is aware of the Respondent's concern about the lack of medication used for the Appellant's mental status.

[37] The Appellant has provided letters of support from Dr. Sharma and the mental health nurse who has treated the Appellant. It is noted in these documents about the trial of several medications to control some of the Appellant's symptoms.

[38] The Tribunal is satisfied that the evidence from both mental health professionals provide a clear picture of the Appellant's functional capabilities and how they affect her ability to work. As well the Tribunal relies on the Appellant's description of her symptoms and how they affect her functional abilities.

[39] The predictability and reliability of the Appellant in the work force are significant considerations in the analysis of whether the Appellant is disabled within the meaning of the *CPP*. (*B.B. v. MHRSD* (October 14, 2008), CP 25356 (PAB)).

[40] The Appellant has tried to return to work on several occasions and has not been able to manage the number of hours in a month to be substantially gainful. In addition she has not been a reliable employee with many absences and the inability to work many hours.

Although the Appellant has only tried to return to her previous position, the symptoms that prevented her from working would also prevent her from working in any type of job.

[41] The severity of her conditions since May 2011 has been such that she would at very best, highly unreliable and unpredictable in the workforce.

[42] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[43] The Appellant has tried obtaining and maintaining employment from a benevolent employer but was unsuccessful.

[44] The Tribunal has carefully reviewed the medical reports and reviewed the evidence of the Appellant in the form of the answers provided to the questions asked by the Tribunal Member. The Tribunal finds that, on a balance of probabilities, the Appellant does have a severe disability within the meaning of the Act.

[45] The Appellant has satisfied the Tribunal that on a balance of probabilities it is more likely than not that she had a severe disability as defined in the Canada Pension Plan at the time of her MQP.

Prolonged

[46] For the Appellant to qualify for a disability benefit, the Tribunal must be satisfied not only that the mental or physical disability is "severe", but also that it is "prolonged." To make such a finding, there must be sufficient evidence to establish that the disability is both "long continued" and "of indefinite duration", or is likely to result in death.

[47] Dr. Sharma, a psychiatrist has been treating the Appellant since June 2011. His diagnosis of the Appellant is major depressive disorder with panic disorder and agoraphobia. He indicates her GAF score is 40-45 when he sent a letter to the Review Tribunal in April 2012. His opinion is that the Appellant has limited coping and functioning abilities and tends to decompensate under stressful situations. He does not feel she is capable of engaging in any kind of employment and her prognosis is poor. (GT1-126)

[48] The Appellant indicates she continues to be treated by Dr. Sharma and sees her Family physician regularly as well.

[49] There is no documentation that provides any suggestion that the Appellant's condition is temporary or is likely to improve in the foreseeable future.

[50] Therefore the Tribunal agrees that there is little likelihood of the Appellant's condition improving in the foreseeable future and accepts that the Appellant's disability is long continued and of indefinite duration.

CONCLUSION

[51] The Tribunal finds that the Appellant had a severe and prolonged disability in May 2010, when she stopped working on her physician's advice. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of September 2010.

[52] The appeal is allowed.

Jane Galbraith

Member, General Division